Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M–02–644 OF 2003
GOPAL SRI RAM, HASHIM YUSOFF AND ZALEHA ZAHARI JJCA
24 OCTOBER 2005

Administrative Law — Judicial review — Application for — Leave — Approach of court — Whether a scrutiny of the merits warranted — Circumstances where a scrutiny of the merits warranted

Administrative Law — Judicial review — Application for — Whether such application may be made by applicant acting in a representative capacity

Civil Procedure — Parties — Representative capacity — Derivative action — Whether derivative action a mere variation of the representation rule

The appellant were directors of a company (nominal sixth respondent) that had a non-performing loan (NPL) acquired by Danaharta (first respondent). A workout proposal prepared and submitted by Danaharta's special administrators (second, third and fourth respondents) together with the report of an independent adviser appointed by Danaharta (the fifth respondent) was approved both by Danaharta and by a majority of the secured creditors of the company. The workout proposal recommended the sale of certain land and property belonging to the company at a sum of RM7.6m. The appellants however claimed that the correct value of the subject land was not less than RM15m. Thus the appellants, on behalf of themselves and also by way of representative and derivative action on behalf of the company, sought leave in the High Court to apply for judicial review of the workout proposal. At the leave proceedings, the AG and counsel for Danaharta appeared and opposed the application. The other respondents did not appear. The High Court judge refused the appellants leave to apply for judicial review. The appellants appealed to the Court of Appeal which had to decide inter alia: (i) the approach the High Court should take when considering an application for leave to issue judicial review; (ii) whether the appellants' motion by way of representative and derivative action was wrongly or improperly initiated; and (iii) the amenability of the respondents to judicial review.

Held, allowing the appeal (by majority):

(1) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous (see para 10); *George John v Goh Eng*

Wah Bros Filem Sdn Bhd & Ors [1988] 1 MLJ 319; *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 CLJ 210; *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 and *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 followed; *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* [1995] 2 MLJ 442 (refd) distinguished; *R v Secretary of State for the Home Department; ex p Rukshanda Begum* [1990] ChD 107 referred.

(2) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) The only circumstance in which a court may, on a leave application, undertake a closer scrutiny of the merits of the case is on an application for extension of time to apply for judicial review. In such an application, the court has to scrutinise the material before it with some care to ensure that there is a good arguable case on the merits warranting the exercise of discretion in the applicant's favour. This is in addition to the requirement that the applicant must provide a satisfactory explanation for the delay on his or her part (see para 16);*Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 referred.

(3) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) This was not a case where the Attorney General merely appeared on the ex parte motion to point out to the court that the application was made out of time. This was a case where arguments of law were addressed on matters which were best suited for determination at the inter partes stage. The High Court had erred in accepting counsel's invitation to exceed the normal role of a High Court in judicial review proceedings. (see para 19).

(4) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) The derivative action is a mere variation of the representation rule as applied in the environment of company law. It is not to be treated in absolute or rigid terms (see para 29).

(5) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) The High Court's decision to dismiss the leave application in limine because the appellants had brought the application in a derivative capacity overlooked O 15 r 6(1) of the RHC. Even if there was a misjoinder in the instant case, it could not defeat the application for leave in the present case because there is nothing in O 15 r 12 of the RHC that excludes its application to judicial review proceedings instituted under O 53 of the RHC. An application for judicial review may be made by an applicant acting in a representative capacity (see para 30). The High Court was therefore wrong in thinking that the instant application for leave could be dismissed out of hand on the ground of misjoinder (see para 32).

(6) (per **Gopal Sri Ram JCA, Hashim Yusoff JCA** concurring) Danaharta, though a company incorporated under the Companies Act 1965 is wholly financed by public funds. The affairs of Danaharta are directly or indirectly under the control of the Minister of Finance, representing the Federal Government. Further, the powers of Danaharta are, apart from its Memorandum of Association, conferred upon it by statute, viz, the Danaharta Act. In these circumstances, and based on authorities, Danaharta is a 'person

or authority' within para 1 of the Schedule to the Courts of Judicature Act 1964 and it is accordingly amenable to judicial review (see para 54).

(7) (per **Zaleha Zahari JCA** dissenting) In a situation like the instant, where counsel for a putative respondent is present on the hearing date and is desirous of being heard at leave stage, it is essentially a matter of discretion of the judge. On the facts, since no one took issue with Danaharta's counsel's presence at the commencement of hearing of the ex parte application, or when directions were given as to the furnishing of written submissions, there was nothing which entitled the Court of Appeal to say that that the High Court judge was in error when he accorded Danaharta's counsel the opportunity of furnishing written submissions. The High Court judge was also not to have been in breach of the procedure prescribed by O 53 of the RHC (see para 78).

(8) (per **Zaleha Zahari JCA** dissenting) Although Danaharta, prima facie, could be considered a 'public authority' because of the statutory powers conferred upon them, for the appellants to succeed the matters under challenge had to fall within the ambit of a 'public' law. However, in the instant case: (i) the special administrators' workout proposal in respect of the proposed sale of the land in issue and in approving the same, was an activity falling within a commercial environment under the realm of private law, and not under public law; (ii) the advise of the independent advisor in respect the proposed sale of the land was clearly a matter of a commercial transaction and could not be the subject matter of judicial review; (iii) the decision of the secured creditors in respect of a sale of a particular asset of a distressed company did not fall within the realm of public law warranting a public law remedy (see paras 92–95).

(9) (per **Zaleha Zahari JCA** dissenting) Derivative actions are only permitted within the five exceptions to the rule in *Foss v Harbottle*. None of the permitted exceptions occurred on the facts of the present case for the appellants to take capacity. It was therefore clearly wrong for the appellants to have framed the title of the proceedings in a representative and derivative capacity for the benefit of the company (see para 99).

(10) (per **Zaleha Zahari JCA** dissenting) On the facts, the High Court judge was right in refusing to exercise his discretion in granting leave. The issues raised by the appellants were such that it merited refusal of leave in limine and that no useful purpose would be served by re-ventilating those arguments at the hearing of the substantive motion (see para 104).

[Bahasa Malaysia summary

Perayu merupakan pengarah sebuah syarikat (responden keenam) yang mempunyai pinjaman tidak terlaksana (NPL) yang diperoleh oleh Danaharta (responden pertama). Cadangan kertas kerja yang disediakan dan dikemukakan oleh pentadbir khas Danaharta (responden kedua, ketiga dan keempat) bersama dengan laporan penasihat bebas yang dilantik oleh Danaharta (responden kelima) telah diluluskan kedua-duanya oleh Danaharta dan melalui majoriti pemiutang bercagar syarikat tersebut. Cadangan kertas kerja itu mencadangkan jualan beberapa tanah dan harta tertentu milik syarikat pada jumlah RM7.6j. Perayu-perayu bagaimanapun mendakwa bahawa nilai sebenar tanah yang dikatakan tidak kurang daripada RM15j.

Oleh itu perayu-perayu, bagi pihak mereka dan juga melalui representasi dan tindakan terbitan bagi pihak syarikat, memohon kebenaran Mahkamah Tinggi untuk memohon kajian semula kehakiman terhadap cadangan kertas kerja itu. Semasa prosiding kebenaran itu, Peguam Negara dan peguam bagi pihak Danaharta telah hadir dan membangkang permohonan itu. Responden-responden lain tidak hadir. Hakim Mahkamah Tinggi enggan membenarkan perayu-perayu memohon kajian semula kehakiman. Perayu-perayu telah mengemukakan rayuan ke Mahkamah Rayuan yang perlu memutuskan, antara lain: (i) pendekatan yang Mahkamah Tinggi patut ambil apabila mempertimbangkan satu permohonan untuk kebenaran mengeluarkan kajian semula kehakiman; (ii) sama ada usul perayu-perayu melalui representasi dan tindakan terbitan telah dimulakan dengan salah atau tidak betul; dan (iii) Ketahanan ujian responden-responden terhadap kajian semula kehakiman.

Diputuskan, membenarkan rayuan (dengan majoriti):

(1) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Mahkamah Tinggi tidak perlu melihat merit kes di peringkat kebenaran itu. Peranannya hanya untuk melihat jika permohonan untuk kebenaran itu adalah remeh (lihat perenggan 10); *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319; *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 CLJ 210; *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 dan *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134diikut; *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* [1995] 2 MLJ 442 dibeza; *R v Secretary of State for the Home Department; ex p Rukshanda Begum* [1990] ChD 107 dirujuk.

(2) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Satu-satunya keadaan di mana mahkamah boleh, atas satu permohonan untuk kebenaran, menjalankan satu penelitian terhadap merit kes adalah atas satu permohonan lanjutan masa untuk memohon kajian semula kehakiman. Dalam permohonan sedemikian, mahkamah perlu meneliti material itu sebelum ia dengan berhati-hati memastikan bahawa ia adalah satu kes yang boleh dihujahkan atas merit yang mewajarkan penggunaan budi bicara yang menyebelahi pemohon. Ini adalah tambahan kepada keperluan yang pemohon perlu kemukakan untuk memberikan penjelasan memuaskan kerana kelewatan di pihaknya (lihat perenggan 16); *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 dirujuk.

(3) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Ini bukan satu kes di mana Peguam Negara hanya hadir dalam usul ex parte untuk mengemukakan kepada mahkamah bahawa permohonan yang dibuat adalah di luar had masa. Ini merupakan satu kes di mana hujah-hujah perundangan mengutarakan perkara-perkara yang sesuai untuk ditentukan di peringkat inter partes. Mahkamah Tinggi telah terkhilaf dalam menerima undangan peguam untuk melampaui peranan biasa sebuah Mahkamah Tinggi dalam prosiding kajian semula kehakiman (lihat perenggan 19).

(4) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Tindakan terbitan hanya satu kelainan rukun representasi seperti yang digunakan dalam bidang undang-undang syarikat. Ia tidak patut dianggap sebagai terma-terma yang mutlak atau ketat (lihat perenggan 29).

(5) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Keputusan Mahkamah Tinggi untuk menolak permohonan untuk kebenaran in limine kerana perayu-perayu telah memulakan permohonan itu dalam satu kapasiti dengan tidak mengendahkan A 15 k 6(1) KMT. Jikapun terdapat salah cantum dalam kes semasa, ia tidak boleh menggagalkan permohonan untuk kebenaran dalam kes semasa ini kerana tiada apa-apa dalam A 15 k 12 KMT yang mengecualikan permohonannya terhadap prosiding kajian semual kehakiman yang dimulakan di bawah A 53 KMT. Satu permohonan untuk kajian semula kehakiman boleh dibuat oleh pemohon yang bertindak dalam kapasiti representasi (lihat perenggan 30). Mahkamah TInggi dengan itu terkhilaf apabila memikirkan bahawa permohonan segera untuk kebenaran itu boleh ditolak atas alasan salah cantum (lihat perenggan 32).

(6) (oleh **Gopal Sri Ram HMR, Hashim Yusoff HMR** bersetuju) Danaharta, meskipun satu syarikat yang ditubuhkan di bawah Akta Syarikat 1965 dibiayai sepenuhnya oleh dana awam. Urusan Danaharta secara langsung dan tidak langsung adalah di bawah kawalan Kementerian Kewangan, mewakili Kerajaan Persekutuan. Bahkan, kuasa-kuasa Danaharta adalah, selain daripada Memorandum Persatuannya, diberikan kepadanya oleh statut, melalui Akta Danaharta adalah. Dalam keadaan sedemikian, dan berdasarkan pihak-pihak berkuasa, Danaharta adalah 'person or authority' dalam maksud perenggan 1 kepada Jadual Akta Mahkamah Kehakiman 1964 dan ia sewajarnya bertanggungjawab terhadap kajian semula kehakiman (lihat perenggan 54).

(7) (oleh **Zaleha Zahari HMR** menentang) Dalam situasi seperti ini, di mana peguam bagi pihak responden itu hadir pada tarikh perbicaraan dan berhasrat untuk didengar di peringkat kebenaran ini, ia adalah perkara yang memerlukan budi bicara hakim. Berdasarkan fakta berikut, memandangkan tiada sesiapa yang mempertikaikan kehadiran peguam Danaharta di permulaan perbicaraan permohonan ex parte itu, atau apabila arahan diberikan untuk mengemukakan penghujahan bertulis, tiada apa-apa yang memberi hak kepada Mahkamah Rayuan untuk mengatakan bahawa hakim Mahkamah Tinggi telah terkhilaf apabila beliau memberikan peguam Danaharta peluang untuk mengemukakan penghujahan bertulis tersebut. Hakim Mahkamah Tinggi juga tidak melanggar prosedur yang ditetapkan oleh A 53 KMT (lihat perenggan 78).

(8) (oleh **Zaleha Zahari HMR** menentang) Meskipun Danaharta, prima facie, boleh dianggap sebagai 'public authority' kerana kuasa-kuasa statutori yang diberikan kepadanya, agar perayu-perayu berjaya dalam perkara yang dicabar hendaklah terangkum di bawah skop undang-undang 'public'. Bagaimanapun, dalam kes ini: (i) cadangan kertas kerja pentadbir khas berkaitan cadangan jualan tanah yang dipersoalkan dan dalam membenarkan yang sama, adalah satu kegiatan yang terangkum di bawah persekitaran komersial di bawah undang-undang persendirian, dan bukan undang-undang awam; (ii) nasihat penasihat bebas berkaitan cadangan jualan tanah itu dengan jelas satu transaksi komersial dan tidak mungkin menjadi perkara berkaitan kajian semula

kehakiman; (iii) keputusan pemiutang bercagar berkaitan jualan aset tertentu suatu syarikat yang menghadapi masalah tidak terangkum di bawah undang-undang awam yang mewajarkan remedi undang-undang awam (lihat perenggan 92–95).

(9) (oleh **Zaleha Zahari HMR** menentang) Tindakan terbitan hanya boleh dibenarkan berdasarkan lima pengecualian kepada rukun *Foss v Harbottle*. Tiada antara pengecualian tersebut berlaku berdasarkan fakta-fakta kes semasa untuk perayu-perayu menggunakan kapasiti itu. Oleh itu adalah jelas salah untuk perayu-perayu membuat tajuk prosiding itu dalam kapasiti representasi dan terbitan untuk manfaat syarikat itu (lihat perenggan 99).

(10) (oleh **Zaleha Zahari HMR** menentang) Berdasarkan fakta-fakta berikut, hakim Mahkamah Tinggi adalah betul kerana enggan menggunakan budi bicaranya untuk memberikan kebenaran. Persoalan yang ditimbulkan oleh perayu-perayu memeritkan penolakan kebenaran in limine dan bahawa tiada tujuan berguna dapat disampaikan dengan menyuarakan semula hujah-hujah tersebut semasa perbicaraan usul substantif itu (lihat perenggan 104).]

Notes

For a case on representative capacity, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 4594.

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–208.

Cases referred to

Ajay Hasia v Khalid Mujib AIR 1981 SC 487 (refd)
Commissioners of Sewers v Gellatly [1876] 3 ChD 615 (refd)
Damodaran v Vesudeva [1975] 2 MLJ 231 (refd)
Dwarka Nath v Income Tax Officer AIR [1966] SC 81 (refd)
Eh Riyid v Eh Tek [1976] 1 MLJ 262 (refd)
Ex parte Davis [1872] LR 7 Ch App 526 (refd)
Fishermen and Friends of the Sea v The Environment Management Authority & Anor [2005] UKPC 32 (refd)
Foss v Harbottle [1843] 67 ER 189 (refd)
Ganpat v Lingappa AIR [1962] Bom 104 (refd)
George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors [1988] 1 MLJ 319 (folld)
Hartmont v Foster [1882] LR 8 QBD 82 (refd)
IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (refd)
Irving v Askew [1870] LJQB 118 (refd)
JP Berthelsen v Director-General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (folld)
John v Rees [1970] ChD 345 (refd)
Mohamed Nordin bin Johan v Attorney General, Malaysia [1983] 1 MLJ 68 (folld)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Ramana Dayaram Shetty v The International Airport Authority of India AIR [1979] SC 1628 (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 (refd)
Solicitor, Re A [1890] LR 25 QBD 17 (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332 (refd)
Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia [1995] 2 MLJ 442 (distd)
Wallersteiner v Moir [1975] QB 373 (refd)
Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors [2003] 1 MLJ 98 (refd)
YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur [2003] 1 CLJ 210 (folld)

Legislation referred to

Companies Act 1965 s 3
Courts of Judicature Act 1964
Pengurusan Danaharta Nasional Berhad Act 1998 ss 3, 4(3), 5, 9, 10, 22, 24, 26, 30, 31, 32, 33, 44, 45, 46, 47
Federal Constitution art 63
Financial Procedure Act 1957 s 14
Indian Constitution art 226
Jammu and Kashmir Registration of Societies Act 1898
Legal Profession Act 1976
Pengurusan Danaharta Nasional Berhad Act 1998
Rules of the High Court 1980 O 15 rr 6(1), 12, O 53 r 2(4)
Rules of the Supreme Court 1883 [UK] O XVI r 9

Appeal from: Application for Judicial Review No 13–2 of 2002 (High Court, Melaka)

Lim Whei Chun (Lim Whei Chun) for the appellants.
J Kannaperan (Shearn Delamore & Co) for the first respondent.
Anita Ibrahim (Lee Hishamuddin Allen & Glendhill) for the second, third and fourth respondents.
G Balan (Asia Pacific Management Insight Sdn Bhd) for the fifth respondent.
Mary Lim Thiam Suan (Senior Federal Counsel) for the Attorney-General.

Gopal Sri Ram JCA:

[1] This case essentially involves a point of procedure in judicial review proceedings. It is nevertheless an important case. Because it also concerns the amenability to judicial review of the several entities created by the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act').

[2] For present purposes, the facts here fall within a narrow compass. They are set out in a succinct form by the learned judge in his judgment which is reported in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332. It suffices to reproduce an extract from the headnote of the case which accurately reproduces the learned judge's appreciation of the facts:

The applicants were three of the four directors of Tang Kwor Ham Realty Sdn Bhd, ('the company'), and held a total of 60% of the shares therein. The first respondent ('Danaharta') was a company incorporated under the Companies Act 1965, while the second, third and fourth respondents ('the special administrators') were special administrators appointed by Danaharta under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act'). The fifth respondent was an independent adviser appointed by Danaharta under the Danaharta Act, while the company was a nominal sixth respondent. The company owned the land and property on which the Grand Hill Hotel was situated ('the subject land'). The company also had a non-performing loan ('NPL') of about RM26m pursuant to credit facilities granted to it and this NPL was acquired by Danaharta under the Danaharta Act and a vesting certificate. A workout proposal prepared and submitted by the special administrators to Danaharta ('the workout proposal'), together with the report of the fifth respondent, was approved both by Danaharta and by a majority of the secured creditors of the company. The workout proposal recommended the sale of the subject land at RM7.6m. The applicants claimed that the correct value of the subject land was not less than RM15m. Thus the applicants, on behalf of themselves and also by way of representative and derivative action on behalf of the company, sought leave to apply for judicial review of the workout proposal. The applicants claimed that the workout proposal was infused with public elements and was thus amenable to judicial review.

[3] On these facts, the learned judge refused the applicants before him (appellants in this court) leave to apply for judicial review. And he did that after entertaining strenuous opposition to the application both from the Attorney General (who was not a party to the application but was entitled as of right to appear upon it) and counsel for Danaharta in the form of written argument. There is another important fact that I must mention at this juncture. The other respondents did not appear at what was meant to be the ex parte hearing of the applicants' motion for leave. So they really had no opportunity of taking any position on the facts and the law before the learned judge. The applicants have appealed against the learned judge's decision.

[4] Now, when this appeal came before us on 11 July 2005 we formed the view that the learned judge ought not to have refused the applicants leave to apply for judicial review. We therefore called upon counsel for the respondents to argue why the appeal ought not to be allowed. Fortunately for us, the Attorney General had, on this occasion the advantage of formidable representation in the person of learned senior federal counsel, Dato' Mary Lim who had also appeared in the court below. I must in particular thank her for her arguments and the citation of relevant authority, a trait rarely seen at the Bar these days. Based on her submissions and those of learned counsel for the first respondent, there are two broad issues that fall for determination. One procedural; the other substantive. I will address each of these in turn.

[5] There are two procedural points. The first has to do with what is to happen at the leave stage in proceedings for judicial review. Applications for leave under O 53 are made — and they must be made — through a two stage process. This is the historical fallout of the practice of the old Court of King's of having an ex parte nisi hearing before deciding whether to issue notice to the opposite party to show cause why the particular prerogative writ should not issue against it. In other words, the opposite party had to make what was called 'a return to the writ'. The inter partes hearing concluded with a direction that the writ issues or not, ie, the rule nisi being made absolute. In 1883, when the English Rules of the Supreme Court were

introduced, prerogative writs were replaced with prerogative orders and we continued to follow those 1883 Rules until the introduction of the Rules of the High Court in 1980.

[6] The question that arises for acute decision in this appeal is this. What is the approach the High Court should take when considering an application for leave to issue judicial review? The answer to that question is to be found in the following passage in the speech of Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 643:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[7] In *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* [1988] 1 MLJ 319, Lim Beng Choon J described in crisp language the approach the court should take at the leave stage. He said:

> At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of certiorari but rather for leave to apply for such an order. On principle and authority, I am of the view that at this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a prima facie case that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted ultra vires the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

[8] Again in *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur* [2003] 1 CLJ 210, Ramly Ali J summarised the task that the court has to perform at the leave stage in the following terms:

> At this stage of the proceedings, the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guide perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the substantive application(see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617).

[9] In my judgment, both these cases, *George John v Goh Eng Wah Bros Filem Sdn Bhd & Ors* and *YAM Tunku Dato' Seri Nadzaruddin ibni Tuanku Jaafar* correctly state the law. It does not appear that any of the learned counsel who appeared in the court below cited these authorities to the learned judge.

[10] To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art 63 of the Federal Constitution).

[11] In *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68, Raja Azlan Shah Ag LP laid down the test to be applied at the leave stage in judicial review proceedings as follows:

> We allowed the appeal and granted the appellant leave to apply for an order ofcertiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. When this Court grants leave, it has jurisdiction to hear the substantive motion itself. This practice is not inconsistent with the one in vogue in England: see*Regina v Industrial Injuries Commissioner; ex parte Amalgamated Engineering Union* [1966] 2 QB 21 which was followed in *Regina v Croydon Justices, Ex Parte Lefore Holdings Ltd* [1980] 1 WLR 1465.

[12] This test was applied by the Supreme Court in *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, where Abdoolcader SCJ said:

> At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. We accordingly applied and followed the procedure adopted by the Federal Court in *Mohamed Nordin bin Johan v Attorney General Malaysia* [1983] 1 MLJ 68 (at p 70) and allowed the appeal, and granted leave to the appellant to apply for an order of certiorari. We then turned to a consideration of the substantive motion for certiorari on an undertaking by counsel for the appellant to formally file this in the registry.

[13] Learned senior federal counsel relied on the following passage in the judgment of Edgar Joseph Jr SCJ in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* [1995] 2 MLJ 442 as stating a different —and a higher test — than that stated in *Mohamed Nordin bin Johan v Attorney General, Malaysia* and *JP Berthelsen v Director-General of Immigration* (at p 449):

> *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:
>
> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award,… namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[14] With respect, I am unable to agree with this argument of learned senior federal counsel. In the first place, to say that a case is frivolous is the same thing as saying that there is no arguable case. It is mere semantics. In the second place, the point made by the English Court of Appeal which was adopted in toto as correct by the Supreme Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia* is that in a case where the High Court has a doubt about whether the case is frivolous or not, it is for that court to invite the putative respondent to attend and make representations as to whether or not leave should be granted. So, the putative respondent to the substantive motion is not entitled as a matter of right to appear, demand to be heard and to convert the proceedings into a full blown opposed ex parte hearing on the merits of the application. Third, you must note the important caveat entered by the English Court of Appeal in RukshandaBegum that 'the inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing'. Fourth, neither *Mohamed Nordin bin Johan v Attorney General, Malaysia* nor *JP Berthelsen v Director-General of Immigration* were cited to the Supreme Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia*. Had there been such citation, it is doubtful whether the Supreme Court would have been prepared to apply the decision of an English Court of Appeal to that of its own earlier decision and that of its immediate precursor.

[15] There is this further point. The constraints referred to in *Rukshanda Begum* were never applied in this case. First, it was not the court that invited the first respondent to attend because there was a doubt in the court's mind whether leave should be granted. Instead, the first respondent appeared and proceeded to oppose the leave application as if it was entitled to do so as a matter of right. In the second place, the court permitted the ex parte hearing to become a full bloomed exploration of the merits of the case. A reading of the judgment as a whole makes that amply clear.

[16] The only circumstance in which a court may, on a leave application, undertake a closer scrutiny of the merits of the case is on an application for extension of time to apply for judicial review. It is not difficult to see why this is so. A party applying for an extension of time is really relying on the court to exercise discretion in his or her favour. And it is trite that the onus is on such a person to satisfy the court that there are good grounds why discretion ought to be favourably exercised. To that end, it is necessary for an applicant to place all relevant material before the court to

demonstrate that he or she has more than an arguable case on the merits. It therefore becomes a matter of necessity for the court to scrutinise the material before it with some care to ensure that there is a good arguable case on the merits warranting the exercise of discretion in the applicant's favour. This is, of course, in addition to the requirement that the applicant must provide a satisfactory explanation for the delay on his or her part. See *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105.

[17] In *Fishermen and Friends of the Sea v The Environment Management Authority & Anor* [2005] UKPC 32, the appellants moved Bereaux J of the High Court of Trinidad & Tobago for an extension of time to file proceedings for judicial review. The learned judge heard this application over six days at the end of July 2002 and refused the appellants an extension of time to apply for judicial review. The appellants appealed to the Court of Appeal which, by a majority, affirmed the judge's decision on the ground that Bereaux J had properly exercised his discretion in refusing to extend the time. A further appeal to the Privy Council also failed. Lord Walker of Gestingthorpe who delivered the Advice of the Board said (at para. 27):

> Their Lordships do not accept that (as Lucky JA thought) the judge, by refusing an extension of time, pre-empted the determination of the most important issues in the case. He recognised that he could have carried forward the issue of delay to a substantive hearing. But he had in the course of a six-day hearing done far more than make a 'quick perusal' of the merits. As their Lordships read his judgment he expressed a definite preliminary view against granting an extension of time, because of the unjustifiable delay on the part of FFS, but then went on to test that conclusion against other issues, including the public interest and the strengths and weaknesses of FFS's case. His consideration of those other matters did not alter his preliminary view. On the contrary, they confirmed his view that an extension should not be granted.

[18] In my judgment, the principle to be distilled from the authorities is this. It is not an improper exercise of discretion for a judge who forms the preliminary view that an application for extension ought to be refused to hear full argument on the merits of the case for the purpose of testing his preliminary conclusion against the other issues that arise in the case, including the strength and weakness of the respondent's case. For, it may well be that after considering the merits, he may come to the conclusion that although the particular applicant was guilty of inordinate delay, the public interest and the conduct of the respondent justifies the grant of an extension of time. I would add that this approach is not confined only to applications for judicial review but to civil proceedings generally.

[19] For the reasons already given, I find myself unable to agree with the learned judge's approach in this case. This is not a case where the Attorney General merely appeared on the ex parte motion to point out to the court that the application was made out of time. This is a case where arguments of law were addressed on matters which are best suited for determination at the inter partes stage. In short, the Attorney General and the first respondent in this case drove a coach and horses through the two stage procedure specially provided for by O 53 of the RHC. As Hashim Yeop Sani J observed in *Ong Guan Teck & Ors v Hijjas*, 'The first principle is that the rules of court must prima facie be obeyed…'. There was certainly no observance of that first principle in this case. Quite the opposite. Unfortunately, the

learned judge, in my respectful view erred in accepting counsel's invitation to exceed the normal role of a High Court in judicial review proceedings. With that, I turn to the second procedural point.

[20] This has to do with the capacity in which the applicants made the application for leave. It was taken up at the leave stage by both learned senior federal counsel and learned counsel for the first respondent. Here, I can do no better than to quote some of the passages from the learned judge's judgment:

> In essence, it was contended that the motion by way of representative and derivative action is wrongly or improperly initiated by the applicants who are the majority shareholders as they together hold 60% interest in the company, and that a derivative action is maintainable in respect of an enforcement of a private law remedy and not in public law.

[21] The learned judge agreed with this submission. He said:

> While a representative action is regulated by O 15 r 2 a derivative action is not specifically provided in the rules. Nevertheless, it is in a sense a representative action and O 15 r 2 may be invoked in appropriate cases. Generally, the rule in *Foss v Harbottle* [1843] 67 ER 189 established that:
>
> > If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting have no locus standi to bring an action to remedy a wrong done to a company.
>
> However, there are five exceptions to the above rule whereby a minority shareholder may be a plaintiff viz:
>
> (1) ultra vires acts;
>
> (2) fraud on the minority;
>
> (3) special majorities ie, when something is done by a simple majority where a special majority is required by the Act or the articles;
>
> (4) personal rights ie, where a member is suing to enforce his own rather than the company's rights; and
>
> (5) where the justice of the case requires. (see *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487, per Edgar Joseph Jr J (later FCJ) following *Edwards v Halliwell* [1950] 2 All ER 1064).
>
> In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417, our Court of Appeal through the judgment of Gopal Sri Ram JCA explained as follows:
>
> > … derivative action; an ingenious procedural device created by Court of equity by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company…

A While a derivative action is intended to protect the rights of minority shareholders, (see eg *United Engineers (M) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor* [2001] 6 MLJ 511) it appears that the test of its applicability is to be found in the element of control particularly de facto control over the litigation machinery of the company. In *Ting Chong Maa v Chor Sek Choon* [1989] 1 MLJ 477, the plaintiff was a shareholder while the defendant was the managing director of a company, in which both of
B them held equal equity. On a claim by the plaintiff for accounts and enquiries of secret profits which the defendant had obtained from their company, the defendant applied to strike out the plaintiff's claim on the ground that the plaintiff did not have locus standi. Peh Swee Chin J (later FCJ) held that the plaintiff although not a minority shareholder had locus standi to bring the claim for the benefit of the company as the defendant, the alleged wrongdoer, was in control of their company. The learned judge was of the view that the
C majority or minority shareholding was not a conclusive test but control, including de facto control, is.

In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1980] 2 All ER 841, a wider approach to the determination of control was suggested by Vinelott J that there would be an exception to the rule in *Foss v Harbottle*, if it could be shown that the wrongdoers were
D able 'by means of manipulation of their position in the company' to ensure that the action is not brought by the company. This was cited with approval by Edgar Joseph Jr J (later FCJ) in *Tan Eng Guan*, who added that the traditional view of 'control' was based on ownership of shares but here is a new view of control — as to who has de facto control of the company. I am in complete concurrence with the decisions of Peh Swee Chin J (later FCJ), Vinelott J and Edgar Joseph Jr J (later FCJ) who have consistently adopted the new view of de facto
E control, in order to enable the shareholders, be they minority, equal or majority shareholders, to bring themselves within the exceptions to the rule in *Foss v Harbottle*, and hence the necessary locus standi to maintain an action against the company and the wrongdoers in control of the company.

Be that as it may, I find considerable merit in the submission on behalf of the learned Attorney-General to the effect that these authorities on derivative action have been decided
F in the context of corporate matters and the remedies sought therein were private remedies which are quite dissimilar from the instant case which focuses on remedies in public law.

In the circumstances, I am unable to see any support that may be garnered by the applicants in commencing this derivative action for the purpose of seeking public law remedies by way of judicial review under O 53, and the application herein could be dismissed on this ground
G alone.

[22] With respect, I am unable to agree with the learned judge. There is really no magic in the expression 'derivative action'. It is merely a procedural device introduced by the Court of Chancery as a variation of another rule of procedure.
H Some background is useful to understand the way it works.

[23] Historically, the common law adopted an extremely rigid procedure. Only immediate parties to a dispute were permitted access to the Common Law Courts. It did not matter that there were other persons interested in the proceedings.
I Each person had to commence his own action. It mattered not that this would result in a multiplicity of suits. The Court of Chancery tried to alleviate this. But the rule it introduced produced equal injustice. The rule in Chancery was that all parties must be brought before the court to do complete justice. This was sometimes

a physical impossibility as the plaintiffs or defendants were too numerous to be added as parties to an action. The rule was therefore relaxed and one or more persons were permitted to represent all those who shared a common interest with him in the subject matter of the action either as plaintiffs or as defendants. So you find Jessel MR in *Commissioners of Sewers v Gellatly* [1876] 3 ChD 615 saying that he understood:

> the rule of the Court of Chancery, ever since Lord Hardwicke's time, to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right — and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number — some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted.

[24] It is this relaxation which the Master of the Rolls referred to that was eventually housed in O XVI r 9 of the 1883 Rules and is now O 15 r 12 of the RHC. It deals with representative actions. In *John v Rees* [1970] ChD 345, Megarry J, after referring to the oft-quoted passage in the speech of Lord Macnaghten in *Duke of Bedford v Ellis* [1901] AC 1 said:

> This seems to me to make it plain that the rule (meaning O 15 r 12) *is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice*. Such an approach is, I think, at least consistent with cases such as *Bromley v Smith* [1826] 1 Sim,*Wood v McCarthy* [1893] 1 QB 775, and *Wyld v Silver* [1963] Ch 243; and in *Harrison v Marquis of Abergavenny* [1887] 3 TLR 324, Kay J described that rule as being 'a rule of convenience only'. The approach also seems to be consistent with the language of RSC O 15 r 12(1). This provides that 'Where numbers persons have the same interest in any proceedings… the proceedings may be begun, and, unless the Court of otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.'
>
> By r 12(3)–(6), ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability. The language is thus wide and permissive in its scope; yet it provides adequate safeguards for the substance. I would therefore be slow to apply the rule in any strict or rigorous sense: and I find nothing in the various passages cited to me from Daniell's Chancery Practice (8th Edn., 1914) which makes me modify this view. (Emphasis added.)

[25] Now, where you have a flexible rule of court like O 15 r 12, it is unsafe to locate an exact precedent to determine the applicability of that rule to a particular case. For that would be doing the very thing that Lord Macnaghten spoke against in *Duke of Bedford v Ellis*, namely, permitting the rule to become rigid. If authority is needed, it is to be found in *Tafe Vale Rly Co v The Amalgamated Society of Rly Servants* [1901] AC 426 where Lord Lindley said:

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old,

A and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various Divisions of the High Court by the Judicature Act 1873, ss 16 and 23-25, and Order XVI r 9; and the unfortunate observations made on that rule in *Temperton v Russell* [1893] 1 QB 435 have been happily corrected in this House in the *Duke of Bedford v Ellis* and in the course of the argument in the present case.

B

[26] The derivative action, as I have already said, is a mere variation of the representation rule as applied in the environment of company law. It was a procedural device invented by the Court of Chancery to get over the rule in *Foss v Harbottle* [1843] 67 ER 189. Indeed, Wigram VC in his judgment in *Foss v Harbottle* refers to
C the bringing of proceedings 'in the name of some one whom the law has appointed to be its representative.' What he is referring to there is a representative proceeding; bearing in mind, of course, that the words he uses to describe such a proceeding were uttered at a time when representative actions were in their foetal stage.

D **[27]** As a general rule — and I emphasise that it is only a general rule — the derivative action is available:

where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring
E an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress… *Burland v Earle* [1902] AC 83, per Lord Davey. (Emphasis added.)

[28] One of the features of the derivative action is that the company has to be made
F a party to the action. This is because it is a necessary party to the action and any order made is to be in its favour. But there is at least one case in which so learned a judge as Lord Denning MR permitted a derivative action brought by way of a counterclaim to proceed without the formalities of that device from being complied with. See *Wallersteiner v Moir* [1975] QB 373

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[29] A reading of the cases that discuss the derivative action as a remedial device leads me to the conclusion that like the rule from which it emanates, the device of a derivative proceeding is not to be treated in absolute or rigid terms. There may well be cases where the minority are in control and the majority are unable to resolve the particular complaint in the domestic forum of a general meeting. Take a case where
H the shareholders of a company enter into an agreement in writing under the terms of which management control is to be held by the minority, eg, because it is the minority that is investing the money and providing the expertise for the particular venture. Such an agreement may, and often does, prevent the majority from exercising its power under the articles of association to remove the minority's
I nominee directors at a general meeting. In such a case, if the minority begin to enrich themselves at the expense of the company, then it would not lie in their mouth to say that a derivative action cannot be brought by the majority. If such a plea is permitted to succeed it would deprive an innocent injured victim of that very justice which the derivative action was invented to deliver.

[30] So far as the present case is concerned, I will explain later in this judgment why it was not wrong for the applicants to have framed the title to their application in a representative capacity for the benefit of the company. For the moment, however, there is another point that needs to be made. It has to do with the observation of the learned judge that he was entitled to dismiss the leave application in limine because the applicants had brought the application in a derivative capacity. That observation, with respect, overlooks O 15 r 6(1) of the RHC which says this:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[31] In *Eh Riyid v Eh Tek* [1976] 1 MLJ 262, Raja Azlan FJ when referring to the precursor to O 15 r 6(1) said that:

> the key of the whole rule is that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, which means that if the court cannot decide the question without the presence of other parties, *the cause is not to be defeated*, but the parties are to be added so as to put the proper parties before the court. (Emphasis added.)

[32] So, even if there was a misjoinder in this case, it did not defeat the application for leave in the present case. I say 'even if' advisedly because in my judgment there was no misjoinder in this case. Because, there is nothing in O 15 r 12 that excludes its application to judicial review proceedings instituted under O 53. It follows that an application for judicial review may be made by an applicant acting in a representative capacity. And that is what happened in this case. In my very respectful view the learned judge was therefore wrong in thinking that the instant application for leave could be dismissed out of hand on the ground of misjoinder.

[33] I now turn to the substantive issue raised before the High Court and re-argued before us. There are three points that need to be dealt with under this head. First, the amenability of the respondents to judicial review. Second, the amenability of the particular subject matter to judicial review. And third, the availability of appropriate relief, even if a case is made out. Let me discuss each in turn.

[34] On the amenability point, this is what was put across to the learned judge by those who appeared before him:

> the subject matter sought to be reviewed is not amenable to judicial review as the respondents do not come within the meaning of 'public authority' in O 53 r 2(4) as one has to look at the source rather than the character of the power.

[35] I must say at once that I thought this argument rather odd when it was put to us. That is because there appears to be some confusion in the minds of those advancing this submission. It is too well established in public law that judicial review may be resisted by a respondent on the ground that he is not someone who is amenable to judicial review. So, the award of a private arbitrator is not amenable to judicial review because the arbitrator is not a public decision-maker. Now, as was

explained to counsel during argument, this is quite different from amenability of particular subject matter to judicial review. A public decision-maker may be amenable to judicial review. But the particular subject matter upon which he has decided or acted upon may be non-justiciable, for example, because it is a political question unsuitable of the courts to review. Thus, although the Federal Cabinet, as a body, is subject to judicial review (see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50), not all its decisions are suitable for curial scrutiny. Take the case of decision by the Federal Cabinet to get the Federation to establish diplomatic ties with another country or to enter into a treaty with a foreign sovereign State. Now, as the law presently stands, this is not justiciable subject matter. These are purely political questions. They are wholly unsuitable for ventilation in a court of law. When put in this way, you can see that the amenability of a public body to judicial review and the justiciability of the particular subject matter of complaint are as different as cheese is from chalk. An admixture of the two, as has happened in this case, is a source of perpetual confusion.

[36] To appreciate the arguments advanced before us, it is necessary to examine the status of the first respondent (which I will refer to as 'Danaharta') in the application for judicial review. For reasons that will become apparent later, it is unnecessary to deal with the status of the second, third, fourth and fifth respondents. So far as the sixth respondent is concerned, it is the company which is the affected person and merely a pro forma party. Danaharta is a corporation established by the Danaharta Act. Section 3 refers to Danaharta as being incorporated under the Companies Act 1965 and having its main objective of carrying on business as an asset management company and acquiring, managing, financing and disposing of assets and liabilities. Section 4(3) confers on Danaharta powers in addition to those contained in the Memorandum and Articles of Association. These are powers 'as may be expedient or reasonably necessary for or in connection with or incidental to its objectives'. The subsection goes on to provide that 'the provisions of this Act shall apply to the Corporation in respect of the exercise of such powers'. Section 5 empowers the Minister of Finance to constitute Danaharta's board. Then comes s 9. It is provision of much importance. It provides for the entire share capital of Danaharta to be held by the Minister of Finance. It goes on in its second subsection to confer on the Minister all the rights and powers available to him as Danaharta's shareholder under its Memorandum and Articles of Association. Next there is s 10 which is equally important. It extends s 14 of the Financial Procedure Act 1957 to Danaharta. The effect is that the Federal Government guarantees Danaharta's capital. In other words, all of Danaharta's capital comes from the taxpayers' monies. Then there is s 24 which empowers Danaharta suo motu to recommend to the Oversight Committee (established under s 22) to appoint a Special Administrator over any affected person. In the present instance the sixth respondent is an affected person within the Danaharta Act. There is no dispute about that. To sum up, Danaharta is a company limited by shares all of which are held by the Minister of Finance. It is publicly funded. It has certain far-reaching powers that can adversely affect the ownership rights of individuals (which, for present purposes includes a limited company).

[37] Given these considerations, the question is whether Danaharta is amenable to judicial review. The Attorney General and, of course, the first respondent say that it

is not. They say that the judge held the first respondent not to be amenable to judicial review and that he is correct. In his judgment the learned judge agreed with and applied Faiza Tamby Chik's judgment in *Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors* [2003] 1 MLJ 98. In discussing that case he said:

> On the applicant's application for, inter alia, an order of certiorari to quash the various decisions of the special administrators, Faiza Tamby Chik J held that the first respondent being a limited company incorporated under the Companies Act 1965 is a private entity and not a public authority and that the special administrators are deemed in law as its agents under s 32 of the Danaharta Act. All the decisions of the respondents were held to be the decisions of a private entity ie a business entity in the field of 'private law' in accordance with the spirit of 'freedom of contract' and certainly did not have the character of public law, in which case they were not and should not be subject to judicial review.
>
> I am in entire agreement with the judgment of Faiza Tamby Chik J and hereby apply it to the facts of this application, and arrive at the same conclusion that the workout proposal does not come within the purview of the decision of a 'public authority' in O 53 r 2(4); but concerns commercial transactions made by persons and bodies who are private entities.
>
> The infusion of public element and public interest in the Danaharta Act does not ipso facto make it a decision of a public authority.

[38] Now, *Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors* was a case in which judicial review was sought against the special administrators of the first respondent, Rahman Hydraulic Tin Bhd. A reading of the facts as narrated in the judgment in that case leaves me in no doubt that Danaharta was not a party to the judicial review proceedings there. What Faiza Tamby Chik J actually decided in that case was that the applicant, Wong Koon Seng, was out of time in making his application. The case was therefore disposed off on jurisdictional grounds. All that was said about the non-amenability of the special administrators to judicial review was therefore pure obiter dicta. Whether those observations made obiter are correct is something that I will also deal with later in this judgment. What appears to have misled all in the court below in the present instance, including the learned judge, through no fault of anyone, least of all himself, is the erroneous understanding that Faiza Tamby Chik J had decided that Danaharta was not amenable to judicial review. But that was not the case. It would therefore seem that the learned judge in the present case fell into error in applying to Danaharta a decision that did not affect this part of the case at all. I would emphasise that when Faiza Tamby Chik J was referring, in his judgment, to the Special Administrators as being the agents of the first respondent, he was speaking, not of Danaharta but of Rahman Hydraulic Tin Bhd. It may be the learned judge in the present case thought otherwise. At least that is the interpretation to which his judgment is open.

[39] Be that as it may, the point was taken up before us and argued at length. This court must perforce deal with the point. I therefore return to the question posed: is Danaharta beyond judicial review? Learned senior federal counsel, Dato' Mary Lim and Ms Kannaperan have strenuously argued that Danaharta is not amenable to judicial review because it is a limited company and therefore not a 'public authority' within O 53 of the RHC. It was submitted that judicial review can only go to a person or body who functions in the public law environment. Of course

it is true that on its face Danaharta is a limited company incorporated under the Companies Act 1965. But there are companies and there are companies.

[40] At one end of the spectrum are limited companies (whether public or private it matters not) incorporated under the Companies Act 1965 whose shares are owned by two or more individuals or bodies. They perform no public function and are vested with no statutory powers. They are entirely private in character. The Federal or a State Government or both may own substantial shares in them. And as shareholders, they may dictate the constitution of the board of directors. Malaysia Airlines is an example. Judicial review cannot go to such a company. That was settled beyond argument by the decision of the Supreme Court of India in *Praga Tools Corporation v CV Imanual* AIR [1969] SC 1306. Praga Tools was a company incorporated under the Indian Companies Act 1913. At the material time, the Government of India and the Government of Andhra Pradesh between them held 56% and 32% of its shares respectively. The balance 12% was held by private individuals. As the largest shareholder, the Union Government had the power to nominate the Praga's directors. An attempt to obtain mandamus against Praga failed. Two passages in the judgment of Shelat J merit quotation. In the first he said:

> Even so, being registered under the Companies Act and governed by the provisions of that Act, the company is a separate legal entity and cannot be said to be either a Government corporation or an industry run by or under the authority of the Union Government.

In the second he said:

> Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. *It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings.* A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. (Cf *Halsbury's Laws of England* (3rd Ed), Vol. II, p. 52 and onwards).
>
> *The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus*, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company. (Emphasis added.)

[40] *Praga Tools* is an important case. It establishes the general proposition that the mere fact that the Government is a majority shareholder in a private limited company does not make that company amenable to judicial review. But it is also important for the qualification it makes to which I have lent emphasis in the above quoted passage.

[41] So much for companies entirely private in character. Next in the spectrum are the hybrids. Some of these are former public owned service providers that have been corporatised under a privatisation scheme. Tenaga Nasional and Telecom Malaysia are examples that spring to mind. Their shares are owned by many different persons, including Government, and they are just like any other limited company under the Companies Act 1965 except that they perform public functions which are regulated by statute. Parliament has also given them powers under particular statutes. That is why they are hybrids. And it is because they are hybrids, that their amenability to judicial review depends on the nature and character of the act or omission complained of. Where the company does something or omits to do something within the confines of its private character, then there can be no judicial review. But if it does something that is ultra vires the powers conferred on it by statute, then it becomes amenable to judicial review. This dichotomy that prevails in the case of hybrid companies was dealt with by this court in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 and I do not propose to repeat what was there said.

[42] At the other end of the spectrum are companies of which the Government is the sole shareholder, are funded entirely with public money and have either statutory powers or duties conferred upon them. It is a misnomer to term such a company as purely private in character. It is axiomatic that the law looks at substance and not at mere form. In form these entities are companies. But in truth and substance they are each an instrument of Government. They are therefore a 'person or authority' referred to in para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') and are amenable to judicial review

[43] It was submitted before us that the governing provision was O 53 r 2(4) of the RHC which uses the expression 'public authority' and that Danaharta was not a 'public authority'. In my respectful view, O 53 merely prescribes the procedure whereby to apply to the court for the relief prescribed by para 1 of the CJA Schedule. Being a mere rule of court, it cannot enlarge, cut down, modify or qualify a provision in an Act of Parliament. In fact, O 53 r 1(1) states:

> This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

And r 2(4) provides as follows:

> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[44] Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition,quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. (emphasis added.)

A (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[45] It is to be noticed at once that para. 1 uses the words 'any person or authority' and not 'public authority'. Therefore, in the case of any conflict between O 53 and B para. 1, the latter must prevail. This point was correctly conceded by Dato' Mary Lim and her concession is supported by ample authority. See, *Hartmont v Foster* [1882] LR 8 QBD 82; *Irving v Askew* [1870] LJQB 118; *Re A Solicitor* [1890] LR 25 QBD 17.

C **[46]** In *Ex parte Davis* [1872] LR 7 Ch App 526, James LJ, speaking in the context of the Bankruptcy Rules, said:

> The Act of Parliament is plain, and the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled the rule must give way to the plain terms of the Act.

D **[47]** Again in *Ganpat v Lingappa* AIR [1962] Bom 104, Shah J said:

> It must be borne in mind that rules under any Act could never be intended to override the specific provisions of the Act itself. The purpose of the rules is to provide far procedural matters or matters which are subsidiary to the provisions of the Act.

E **[48]** Indeed, even if O 53 had not existed, our courts could have still issued the relief prescribed by para. 1 directed at 'any person or authority'. Authority for that proposition is to be found in *Damodaran v Vesudeva* [1975] 2 MLJ 231, where Suffian LP said in the context of a different paragraph of the Schedule to the CJA:

F > [I]f there are written laws or rules of court relating to the same, then this power (ie, the additional power conferred by paragraph 1) must be exercised in accordance with them. The proviso (referring to the proviso to CJA section 25(2)) does not mean that if there are no written laws or rules of court relating to the same, then the power cannot be exercised at all.

G **[49]** At this juncture it is necessary to refer to some of the decisions of the Indian Supreme Court on art 226 of the Indian Constitution which is inpari materia with para 1. That article reads — and I will lend emphasis to the material words which correspond with para 1 as follows:

H > Notwithstanding anything in art 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the right conferred I by Part III and for any other purpose.

[50] The first authority is *Ramana Dayaram Shetty v The International Airport Authority of India* AIR [1979] SC 1628 where Bhagwati J made the following observation which is apposite to the present case:

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government.

[51] In the later case of *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487 the Supreme Court, also speaking through Bhagwati J summarised some of the relevant considerations laid down in the *International Airport Authority* case as follows:

(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor… whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of 'deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.'

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

[52] Ajay Hasia concerned the Regional Engineering College, Srinagar, which was a society incorporated under the Jammu and Kashmir Registration of Societies Act 1898. The funds to sustain the college were to come from the Union and State Governments. The Memorandum of Association of the college and its rules gave the Union and State Governments fairly wide powers of control over the business and affairs of the college. The question arose whether the College was an 'authority' within art 226. After considering the status of the college vis a vis the governments, the Supreme Court held that judicial review under art 226 could go to the college as it was an instrumentality of Government.

[53] In the present instance, Danaharta, though a company incorporated under the Companies Act 1965 is wholly financed by public funds. Second, the affairs of Danaharta are directly or indirectly under the control of the Minister of Finance, representing the Federal Government. Third, the powers of Danaharta are, apart from its Memorandum of Association, conferred upon it by statute, viz, the Danaharta Act. In these circumstances, and based on the authorities already cited, it is my considered judgment that Danaharta is a 'person or authority' within para 1 and it is accordingly amenable to judicial review. In arriving at this conclusion, I have

relied primarily on decisions of the Indian Supreme Court and not on English cases. This is because, our written law which governs a case of this nature, namely para 1, has no parallel in England. When our Parliament deliberately puts on a course in public law that bears no resemblance to the English law of prerogative remedies, it would be wrong for us as judges to change course.

[54] But the matter does not rest there. Dato' Mary Lim has argued that there is really no point in this matter proceeding any further since all that needed to be done under the scheme has been done and there is really nothing on which certiorari — which is the principal remedy claimed by the applicants — can bite. It is therefore best, she says, that we leave well enough alone and uphold the orders made by the learned judge. With respect, I do not agree.

[55] It may well be true that at the end of the day, the court hearing the substantive motion may conclude that certiorari is not available on the facts. That does not entitle the court then to dismiss the application. If the court concludes that there are merits in the applicants' complaint, it may, and should, as a matter of justice, grant such relief as is appropriate in the circumstances of the case. That this is a power our courts had under para. 1 even under the former O 53 was settled by the decision of the Federal Court in *R Rama Chandran v The Industrial Court, Malaysia* [1997] 1 MLJ 145, where Edgar Joseph Jr FCJ, after discussing art 226 of the Indian Constitution and para 1 said:

> There are dicta in a wealth of Indian case law, the effect of which is, that the powers of the High Court conferred by art. 226 are not limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate order or direction. (See for example *Jashingbhai v Dist Magistrate, Ahmedabad* AIR [1950] Bom 363, [1950] 52 Bom LR 544; *Ramcharan Lal v. The State of UP* [1953] 1 All 251, AIR 1952 All 752; *Prabhawati Devi v Dist Magistrate* AIR [1952] All 836; *Chhotabhai Jethabhai Patel & Co v Union* [1952] Nag 156; *Amardas v Pepsu* [1953] Pep 63; Krishnankutty v Trav Cochin AIR [1951] Tr C 197; *B Parraju v Gen Manager, BN Rly* AIR [1952] Cal 610.) Though these dicta are in the nature of general observations, they cannot be disregarded out of hand.
>
> There are also India Supreme Court authorities which strongly support the proposition that the power of the courts there, in the field of Public Law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v Bhailal Bhai* AIR [1964] SC 1006; *Dwarka Nath v Income Tax Officer* AIR [1966] SC 81; *Behari Lal Baldeo Prasad. Commissioner Jhansi Division* [1967] 63 ITR 555; *Hindustan Steel Ltd Rourkela v Roy AK* AIR [1970] SC 1401 at p 1407; *Variety Emporium v Mohd Ibrahim* AIR [1985] SC 207 at p 210).

[56] In *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413, a case unfortunately not cited to the learned judge in this case, this court, apart from holding that O 53 should be liberally construed, re-affirmed the principle that the High Court has power to fashion the remedy appropriate to a given case and referred in that context to what Subba Rao J said in *Dwarka Nath v Income Tax Officer* AIR [1966] SC 81:

> This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice whenever it is found. The Constitution designedly used wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but also draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under art 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small county like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Such limitations are implicit in the article and others may be evolved to direct the article through defined channels.

[57] Order 53 r 2(3) now expressly reserves this power to the High Court. That rule reads:

> Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

[58] Accordingly, there is no merit in the learned senior federal counsel's argument that the application is academic.

[59] The other point raised by learned counsel before us, with far less confidence, is that there was here no 'decision' by anyone. And, since O 53 r 2(4) speaks of a 'decision', the applicants have no cause to argue on an application for judicial review. Again I cannot agree. In the first place there was, as demonstrated to a conviction by learned counsel for the applicants indeed a decision made by Danaharta itself. Secondly, O 53 r 2(4) must not be read in isolation. It must be read contextually, together with O 53 r 3(6) which provides:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date *when grounds for the application first arose* or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days. (Emphasis added.)

[60] If the sub-rules are read together and in their proper context, it can be seen that there need not always be an actual decision by someone. Take *Sivarasa Rasiah*'s case. There was no decision by anyone. What had happened was that the appellant, Sivarasa Rasiah had found himself in a position where he was unable to be a member of the Bar Council because of a provision in the Legal Profession Act 1976. He wanted to challenge the provision and it was held that he could do so by way of a declaration claimed by way of judicial review. So, again there is no merit in the point taken.

[61] So far as the special administrators and the independent adviser are concerned, we were advised by their counsel who were before us that they did not appear on the ex parte motion or oppose it. And when we invited them to make submissions, they very properly declined as they had not been heard in the court below. Yet their case appears to have been argued and decided for them. I really do not see why those representing Danaharta were permitted to advance arguments on behalf of parties separately represented by solicitors and counsel. It was really for these parties and their legal advisers to appear and oppose if that was their intention. If they chose not to do so, then I do not understand what business it was of others (who had no instructions from these parties) to do battle for them. Otherwise, it would tantamount to a battle by proxy and this is something the law does not permit.

[62] The learned judge appears, however, to have held that the special administrators are not amenable to judicial review. I do not propose to rehearse the basis on which he so held. It has to do with the correctness of the decision in *Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors*. Now, if we go into that issue and resolve it against the special administrators and the Independent Adviser at this stage, it would mean condemning them without hearing their counsel at all. This is against all rules of fundamental justice and I do not think that it is competent for this court to enter upon such a venture. All we have to decide in this appeal is whether leave should have been granted by the learned judge. Based on the material and the authorities discussed earlier in this judgment, I think that leave ought to have been granted. Whatever arguments that learned counsel for the other respondents may have for their clients not being amenable to judicial review must be re-ventilated at the hearing of the substantive motion. All these difficulties would not have arisen if the matter had proceeded ex parte and leave had been granted. There would have been no prejudice to anyone, as all the arguments taken at the ex parte stage could have been taken on the substantive motion and dealt with to finality. The methodology adopted here has merely delayed the hearing of this case on its merits in which event a single appeal against all issues on their merits would have disposed of the matter once and for all. The lesson is that these so-called short cuts are really the long way around the problem.

[63] For the reasons already given, I would allow the appeal and award all the costs here and in the court below to the appellants. The orders of the learned judge are hereby set aside. There shall be an order in terms of the ex parte motion for leave. Based on the decisions in *Mohamed Nordin bin Johan v Attorney General, Malaysia* and *JP Berthelsen v Director-General of Immigration, Malaysia*, this court may hear the substantive motion on an undertaking by applicants to file the same. But this is not an appropriate case for the exercise of that power. I would remit this matter to the court below so that it may be proceeded with in the ordinary way. The applicants shall file their substantive motion within 14 days from today and serve a copy of the same (after extraction) on the respondents. We will now fix this matter for mention before the High Court at Melaka on a mutually convenient date with a direction to expeditiously dispose of this matter. The deposit shall be refunded to the appellants.

[64] My learned brother Hashim Yusoff JCA has seen this judgment in draft and has expressed his agreement with it.

[65] This is an appeal against the decision of Low Hop Bing J dated 25 June 2003 dismissing the appellants' application for leave to apply for judicial review.

Zaleha Zahari JCA (delivering dissenting judgment):

WHETHER THERE HAS BEEN A BREACH OF O 53 OF THE RULES OF THE HIGH COURT 1980?

[66] A procedural issue arose during arguments at the hearing of this appeal ie, whether the presence of a putative respondent (in this case, the first respondent, hereinafter referred to as 'Danaharta') at the hearing of the appellants'ex parte leave application for judicial review, and the decision of the judge to allow Danaharta's counsel to furnish written submissions, constitutes non-compliance of O 53 of the RHC?

[67] My understanding of the law and the authorities cited, are as follows.

[68] Order 53 of the RHC envisages a two stage process. An applicant must first obtain leave (O 53 r 3(1)), which application must be made ex parte to a judge-in-chambers, supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, supported by affidavits verifying the facts relied on. The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers (O 53 r 3(3)), and must at the same time lodge in those chambers copies of the statement and affidavits.

[69] If leave is granted, the applicant must then file the substantive motion within 14 days after the grant of such leave and must serve the same on all persons directly affected by the application not later than 14 days before the date of hearing specified in the substantive motion.

[70] From the appeal record, it would appear what transpired at the High Court was this. On 13 February 2003, when the ex parte application for leave was called for hearing before Low Hop Bing J, having been notified pursuant to O 53 r 3(3), Dato' Mary Lim Thiam Suan, Senior Federal Counsel, appeared for the Attorney General. Counsel for Danaharta, Ms Jeyanthini Kannaperan, was also present. The other respondents were not present.

[71] From the notes recorded, it could be inferred that by reason of no one taking objection to Danaharta's counsel presence at the ex parte hearing, be it the court by reason of Ms Kannaperan's presence being not at its invitation, nor by the appellants' counsel by reason of the application being an ex parte one, as well as the senior federal counsel, (who, as the representative of the Attorney General had the right of appearance), the judge proceeded to hear submissions of the appellants' counsel.

Mid-way through the appellants counsel's submissions the learned judge decided to proceed by way of written submissions. Directions were then given as to the time frame within which the parties present before him were required to furnish their written submissions. The learned judge then fixed 4 June 2003 as the date when decision would be delivered.

[72] Pursuant to the court's directions written submissions were then filed and exchanged. It is observed that the appellants counsel's written submissions was substantive running over 30 pages of small print at pp 65–80 and 105–121 of the appeal record. In their written submissions the appellants' counsel, in highlighting their complaint, in setting out their arguments on the facts and law in support of their various contentions, made reference to the facts and documents held out by them in their supporting affidavits. From the appellants counsel's written submissions, it can be concluded that the nature of matters under challenge were such that the appellants' counsel had to enter into the realm of facts. In such a situation, the response of the senior federal counsel in meeting the matters in issue (pp 81–104 and 132–136 of the appeal record) was equally substantive. With respect, I am of the considered opinion that a submission which necessarily had to meet all of the matters in issue cannot be considered as 'strenuous'.

[73] As for Danaharta's counsel, who was present at the hearing of ex parte leave application not at the court's invitation, and equally accorded an opportunity by the court to furnish written submissions, based on the record, with respect, there appears to be no basis for one to conclude that the conduct of Danaharta's counsel was such that she considered herself entitled as of right to appear, nor be considered to have demanded that she be heard and to have converted the ex parte proceedings into a full blown opposed ex parte hearing on the merits of the application.

[74] I observe that the written submissions filed by Danaharta's counsel made reference to the senior federal counsel's written submissions and of 'adopting' the same. The fact that Danaharta and the senior federal counsel had similar views in respect of matters in issue is clear from the grounds of judgment of the learned judge itself. In dealing with the respondents contentions, the learned judge referred to the stand taken by the Attorney General and counsel for Danaharta as 'a common stand'.

[75] Although the RHC provides for leave application for judicial review to be made ex parte, from the authorities cited there have been several instances where putative respondents have been given the opportunity of being heard, the objections of which is not necessarily confined to arguments on extension of the time frame prescribed by the RHC for the filing of an application for judicial review. For example, in *Sivarasah Rasiah v Badan Peguam Malaysia & Anor*, the respondents to the application for leave was present at the hearing of the ex parte application and the appeal there from. Both respondents were heard and the objections were upheld by the judge at first instance. Neither the court of first instance, nor the Court of Appeal, found the presence of the respondents at the application for leave for judicial review, and at the subsequent appeal, objectionable.

[76] The Supreme Court in *Tuan Haji Sarip Hamid v Patco Malaysia Berhad* held that the court may itself on its own motion invite a putative respondent to attend and make representations as to whether or not leave should be granted. **A**

[77] Thus, in a situation like the present, where counsel for a putative respondent is present on the hearing date and is desirous of being heard at leave stage, I am of view that it is essentially a matter of discretion of the judge. In a situation where no one took issue with Danaharta's counsel presence at the commencement of hearing of the ex parte application, nor when directions were given as to the furnishing of written submissions, there is nothing which entitles me to say that that the learned judge was in error when he accorded Danaharta's counsel the opportunity of furnishing written submissions and be considered to have been in breach of the procedure prescribed by O 53. **B** **C**

[78] Further, on the facts of this particular case, taking into consideration the fact that the learned judge was already seized of the issues raised by Danaharta as those issues were the very same issues raised by the learned senior federal counsel, the position would accordingly have been the same even if counsel for Danaharta had not appeared and furnished the written submissions which she did. **D**

[79] For the above mentioned reasons given, with respect, I am of the considered opinion that nothing turns on the procedural point raised at the hearing of this appeal as to Danaharta's presence and in being accorded an opportunity of being heard at the ex parte leave stage. I will now consider the appeal on its merits. **E**

THE MEMORANDUM OF APPEAL **F**

[80] In their the memorandum of appeal, the appellants contended that the learned judge had erred in law and facts as follows:

(a) in holding that the second to fourth respondents in the context of the proceedings filed were not 'public authorities' pursuant to O 53 r 2(4) of the Rules, and in not holding that Danaharta in the context of the proceedings filed was a 'public authority' under O 53 r 2(4); **G**

(b) in holding that the appellants had not made out an arguable case;

(c) in holding that the exceptions to the rule in *Foss v Harbottle* in relation to fraud on the minority is not applicable in proceedings relating to public remedies. **H**

WHETHER THE WORKOUT PROPOSAL WAS A 'DECISION' OF A 'PUBLIC AUTHORITY' AMENABLE TO JUDICIAL REVIEW? **I**

[81] The bodies/entities cited by the appellant as respondents (with the exception of the sixth respondent who has been cited as a nominal respondent), have each a different role to play in respect of the company with the non-performing loan culminating in the 'decision' of the secured creditors at the meeting held on 27 September 2002. The appellants' contention was that the several respondents, the

maker of the workout proposal, the body approving it, as well as the body advising on the same, were 'public authorities' whose 'decisions' were amenable to be judicially reviewed.

[82] In making a considered decision on this issue cognizance is given to the following facts: Danaharta is incorporated under the Companies Act 1965 s 3 of Pengurusan Danaharta Nasional Berhad Act 1998 ('Act 587'). Apart from its Memorandum and Articles of Association, its powers are as conferred by the Act 587.

[83] It is overseen by an Oversight Committee consisting of public authorities pursuant to s 22(2).

[84] Section 24 empowers Danaharta to recommend to the Oversight Committee for the appointment of a special administrator of any affected company. Upon being so appointed the special administrator is empowered to take into his custody and control the assets of the company over which he is appointed and manage the same (s 31(1) and (2)). In administrating the affected company, the special administrator is deemed to be acting as the agent of the affected company (s 32). The special administrator is required to prepare a proposal for Danaharta's consideration, setting out his plan for the affected company (s 44(1)) which include, inter alia, a sale of all or part of the undertaking or property of the company (s 44(1B)(c)).

[85] On the facts of this case, the persons appointed as special administrators for the purposes of Act 587 to administer the assets of the sixth respondent and under a statutory duty to submit a 'proposal' for the consideration of Danaharta has been cited under their individual names as the second, third and fourth respondent.

[86] Upon receipt of such a proposal from the special administrator, Danaharta is then required to submit the proposal to an independent advisor appointed under s 26, who is then required to make an appraisal of the proposal and to give its advise on the same (s 44(2)). Danaharta is then required to consider the same (s 45).

[87] Upon Danaharta approving the proposal, the special administrator is then under a duty to send the proposal together with the independent advisor's report, as well as a notice of meeting of secured creditors of the company, to the company and its secured creditors (s 46). The meeting of secured creditors convened will then make a decision whether to approve or reject the proposal (s 46(3)). If approved, the special administrator will then implement the scheme (s 47)

[88] To the question, whether the bodies/entities were public authorities and whether their acts made in exercise of statutory powers conferred by Act 587 were amenable to judicial review, based on the authorities referred to this court's attention, I am of the view that the answer to this question is, in the words of the Court of Appeal in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, 'It depends'. It is abundantly clear that the fact that the tasks conducted have been made pursuant to a statutory provision does not necessarily mean that all matters connected thereto are the 'decisions of a public authority' attracting the court's

powers of judicial review. The exercise of statutory powers has been held to be amenable to judicial review in *OSK & Partners v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179. In*Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174 it has been held to be otherwise. In the *Tenaga Nasional Bhd*'s case, where Tenaga Nasional Bhd, prima facie, can be considered to be a public authority because it was exercising statutory powers, the Court of Appeal held:

> … It depends. If the activity of the appellant in the private law sphere is called into question eg, the alleged wrongful allotment of shares, the alleged removal of a director and the like, then, plainly judicial review will not lie. On the other hand if the activity complained of falls within the public law environment, then of course judicial review is available.

[89] The learned judge held that the workout proposal in this case did not come within the purview of a 'public authority' in Rules of the High Court 1980 O 53 r 2(4) of the RHC but concerns commercial transactions made by persons and bodies who are private entities. The learned judge agreed with the decision of Faiza Thamby Chik J in *Wong Koon Sen v Rahman Hydraulic Tin Bhd & Ors* [2003] 5 CLJ 205. The applicant in that case had sought for an order of certiorari to quash various decisions of the special administrator. Faiza J, on the facts before him, held that the first respondent, being a limited company incorporated under the Companies Act 1965, was a private entity and not a public authority by reason of the special administrators being deemed in law to be its agents under s 32 of Act 587. Faiza J further held that all of decisions of the respondent in that case were decisions of a private entity, ie, a business entity in the field of 'private law' and did not have the character of 'public law', and accordingly were not and should not be subject to judicial review. Low Hop Bing J came to the same conclusion in respect of the workout proposal on the facts in this case and held that, 'The infusion of public element and public interest does not ipso facto make it a decision of a 'public authority".

[90] With the exception of the reasoning given by reference to a rule of procedure (ie, O 53 of the RHC) as a basis for making the decision that he did, I hold that Low Hop Bing J was right in taking into consideration Faiza J's reasoning and decision and of adopting the same to the circumstances of the present case.

[91] Danaharta, prima facie, can be considered to be a 'public authority' because of the statutory powers conferred upon them. Be that as it may, for the appellants to succeed in the matters under challenge, it must fall within the ambit of a 'public' law.

[92] I hold, in the circumstances of the present case, the learned judge was right when he ruled that in exercising the duty of considering the special administrators' workout proposal in respect of the proposed sale of the land in issue and in approving the same, this activity was essentially one falling within a commercial environment under the realm of private law, and not under public law.

[93] The independent advisor, clearly a private entity, whose advise is required to be transmitted onwards for the consideration of secured creditors of the 6th respondent at a meeting for a 'decision' convened for that purpose, cannot in my respectful view, also be considered to be a 'public authority'. The advise of the independent advisor in respect the proposed sale of the land is clearly a matter of a commercial transaction and cannot and should not be the subject matter of judicial review.

[94] Further, a 'proposal' by the special administrators and approval of such a 'proposal' by Danaharta is clearly not determinative of the matter in issue by reason of the fact that the 'proposal' has to be made the subject of 'advise' by an independent advisor. Then again, an advise is but an advise. It may be accepted or it may also be rejected. At the end of the day, as far the facts of this case is concerned, if at all there was a 'decision', it was that of the secured creditors of the company who was at liberty to approve or reject it. Thus, a notice issued for a meeting for the consideration of such a commercial transaction clearly does not fall within public law but private law. The decision of the secured creditors in respect of a sale of a particular asset of a distressed company certainly does not fall within the realm of public law warranting a public law remedy.

WHETHER THE EXCEPTIONS TO THE RULE IN FOSS v HARBOTTLE APPLICABLE?

[95] The learned judge held that he was unable to see any support that may be garnered by the appellants in commencing this derivative action for the purpose of seeking public law remedies by way of judicial review under O 53 and the application could be dismissed on this ground alone.

[96] In making his decision, the learned judge did not accept the appellants' contention that the appellants were entitled to institute these proceedings in a representative/derivative capacity by reason of the special administrators having the monopoly of the right to sue in the name of the company pursuant to s 30 read with s 33 and para 8 Second Schedule to the Act 587 and art 70 of the company's Articles of Association.

[97] I am in agreement with this decision of the learned judge. A derivative action is intended to protect the rights of minority shareholders. The test of its applicability is to be found in the element of control, particularly de facto control, over the litigation machinery of the company. It is but a procedural devise based on the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name. In such a circumstance, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants.

[98] On the facts of this case, it is not in issue that the appellants were not minority shareholders but majority shareholders holding together 60% interest in the company as well as being three of the four directors. In these situation, the learned

judge was right in making the decision that he did. Derivative actions are only permitted within the five exceptions to the rule in *Foss v Harbottle* disallowing minority shareholders locus standi to remedy wrongs to the company and that none of the permitted exceptions occur on the facts of the present case for the appellants to take capacity. It was therefore clearly wrong for the appellants to have framed the title of these proceedings in a representative and derivative capacity for the benefit of the company.

WHETHER THERE WAS AN ARGUABLE CASE?

[99] Has the appellants discharged the burden of establishing an arguable case in this case? The learned judge concluded, having regard to the factual background set out in the affidavits and the statement filed, that there was no arguable case.

[100] The appellants complaint in relation to the workout proposal was on grounds of irrationality and procedural impropriety as reasons warranting the court's interference. Irrational because the appellants say that the price concluded for the sale of the land was too low. It was contended that the correct value of the land in issue was RM15,000,000 and not RM7,600,000 by reason of the appellants having rejected other offers to purchase the property in issue in the last quarter of 2001 in that valuation.

[101] It was also contended that there was procedural impropriety because the appellants have not been given an opportunity to be heard. The appellants' contention was that they were only aware of the workout proposal on 24 September 2002 upon receipt of the Special Administrator's Notice dated 19 September 2002.

[102] From the appellants' own evidence as held out in their supporting affidavit, it is abundantly clear that the appellants were quite involved in the sale of the property in issue at all times having participated in the several transactions (Appendix 1 to exh. 'TSF2' pp 194–323 of the appeal record) and the letters referred therein and sent by the appellants in exh 'TSF2' (pp 222, 224, 227, 228, 232 of the appeal record). There clearly was no substance or ground to support the appellants' complaints. There clearly is no point for further investigation on a full inter partes basis. On the facts of this case, I hold the learned judge was right in concluding that there is no arguable case.

[103] To conclude, the test as enunciated by the Supreme Court in *Tuan Haji Sarip Sarip Hamid* had clearly not been met on the facts of this case. The learned judge was right in refusing to exercise his discretion in granting leave. The issues raised by the appellants were such that it merits refusal of leave in limine and that no useful purpose would be served by re-ventilating these arguments at the hearing of the substantive motion.

[104] In these circumstances, I would dismiss this appeal with costs and affirm the decision of the learned judge.

Appeal allowed.

Reported by John Paul Simon